Office-Supreme Court, U.S.
FILED
MAR 20 1981
ALEXANDER L. STEVAS,
CLERK

DOCKET NO. 80-1349

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON,

Petitioner,

v.

NEIL MARTIN CHRISMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

From the Trial Court through the State Supreme Court, and, now, through this Court, Defendant, Neil Martin Chrisman, has consistently asserted that the act of Officer Daugherty in picking up the marijuana seeds in Mr. Chrisman's dormitory room for further examination constituted an illegal search and seizure nullifying the entire search of the dormitory room in question.

It is obvious from the decision of the Washington Court of Appeals and from the decision of the Washington Supreme Court that both appellate courts are in some disagreement as to whether Officer Daugherty was in the room at the time he saw the marijuana seeds. The Court of Appeals held that he was not in the room,

State v. Chrisman, 24 Wn.App.385, 600 P.2d 1316 (1979) and the State Supreme Court held that he was in the room State v. Chrisman, 94 Wn.2d 711, 716, 619 P.2d 971 (1980). The State adroitly observes that he was both in and out of the room, apparently at the same time. The State on the one hand says Officer Daugherty was in the "area" (first question presented). This can only mean the dormitory room, since the room would have been the protected area. On the other hand, the State says he was not in the room (second question presented).

It has steadfastly been the position of Mr. Chrisman throughout these proceedings that Officer Daugherty was out of the room when the seeds were observed. As will be discussed below, however, whether Officer Daugherty was in

the room or whether he was outside the room makes no difference in determining the validity of the search.

If Officer Daugherty were in the dormitory room, the State is immediately confronted with the proposition that he was not entitled to be in that room. There are two reasons why he was not entitled to be in the dormitory room. The first is that since Mr. Overdahl (the roommate of Mr. Chrisman) had been placed under arrest, it was necessary for the police officer to advise Mr. Overdahl of his Miranda rights (Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966)), prior to eliciting information from him as to his age (a crucial element of the crime for which he had been arrested). When Mr. Overdahl offered to obtain proof of his age at his

dormitory room, he was offering to give evidence against himself prior to the time that he was advised of his right to refuse to give such evidence under Miranda. Hence, when Mr. Overdahl went to his room, accompanied by the officer, the officer was not where he had a right to be, since he was there by virtue of violating Mr. Overdahl's Constitutional rights. Since he was not in a location where he had a right to be, Officer Daugherty's observation of the marijuana is not protected under the plain view doctrine.

In all of the cases cited by the State to justify the police warrantless entry with the defendant, the defendant had requested to go into the room to get something for himself or otherwise fulfill his own purposes. In the case at

bar, Mr. Overdahl went to his room to get evidence, without the benefit of having been provided his Miranda warnings. The State, conveniently, completely ignores this important distinction.

The second reason that Officer Daugherty was not where he had a right to be (if he was in the room) was that he need not have been in the room in order to accomplish what it was that he wanted to accomplish, i.e., keeping Mr. Overdahl in his line of sight. Notice, the officer was obviously not concerned about weapons, nor was he concerned about avoiding the destruction of evidence. Had he been concerned about the possibilities, he would have been at Mr. Overdahl's shoulder, or some place where he could keep Mr. Overdahl's hands in

sight.

If we accept the principle that warrantless intrusions should be kept as narrow as possible, we are left with the proposition that Officer Daugherty should have been outside the dormitory room while Mr. Overdahl was looking for his wallet. In this connection, see Payton v. New York, 445 U.S.573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980).

It seems rather clear that Officer Daugherty felt that he should not be in the room; otherwise, why was he not fully in the room? Obviously, he did not feel it necessary that he be in the room to accomplish his motive.

Thus, as indicated above, if Officer Daugherty were found to be in the room, he obviously did not have the right to be there. The first prerequisite of the "plain view" doctrine, therefore, is not

present.

The justification for the "plain view" doctrine is, of course, that the intrusion into the constitutionally protected area having already been properly made, the police officer need not ignore what comes to his senses. See Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971).

Notice, however, that under the "plain view" doctrine, we are talking about seizing items where the entry is already deemed, for one reason or another, to be valid. The Washington Supreme Court properly found that there was no prior justification for the intrusion in this case (if the intrusion had already been effected).

If Officer Daugherty were outside the room at the time he saw what he

thought might be contraband, as found by the Washington Court of Appeals, the State now has another hurdle which it must overcome. That hurdle is whether or not merely seeing possible contraband through an open door gives a police officer the right to enter the premises in order to "take a closer look". Notice, the "plain view" doctrine would not benefit the State if Officer Daugherty is outside the room when he sees what he thinks is contraband, since the "plain view" doctrine applies only to post intrusion situations.

If Officer Daugherty were outside the room when he saw the substance, the warrantless entry can only be justified by finding the circumstances to be exigent. In State v. O'Herron, 153 N.J.Super. 570, 380 A.2d 728 (1977) the

New Jersey Appellate Court found that there was an illegal search and seizure when the police observed marijuana in the defendant's backyard from a neighbor's backyard, and, without a warrant, seized it. The Court stated at 380 A.2d at page 733:

> We hold, . . . , that a "plain view" observation made without intrusion into a constitutionally protected location does not itself justify a warrantless intrusion and seizure.

In the O'Herron case, the Court noted no special urgency. Similarly, in the case at bar, there was no special urgency. In this connection, see also, Johnson v. U.S., 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948), wherein this Court found that an unmistakable odor of burning opium provided probable cause to obtain a search warrant, but did not provide

sufficient exigent circumstances to permit the entry of a hotel room without a warrant.

Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 86 S.Ct. 2408 (1978) provides clear-cut guidelines as to when exigent circumstances are present. Notice, this Court stated at 437 U.S. 394:

> There was no indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility.

Thus, under the Mincey teachings, if the premises can be guarded, the circumstances are not so exigent as to justify a warrantless entry.

In the case at bar, there is nothing in the record to indicate that the

circumstances were exigent. For instance, no water was running, no toilet was being flushed (there was no toilet in the room), no one was scurrying around trying to hide or destroy evidence. Further, the police officer could have easily stayed at the door and radioed for assistance in obtaining a search warrant. The record is clear that the officer had a portable radio on his person which could have been used. Indeed, the radio was finally used to call for assistance in conducting the search.

The State, in propounding its second issue, would have this Court consider a ruling to the effect that when a police officer, standing outside a protected area, views possible contraband which is in a protected area, the view in itself provides exigent circumstances so as to

permit a warrantless entry into the protected area. This has never been the law in this country and this Court must keep such a result from ever becoming the law, if we are to remain a society free from police state tactics. So far as the undersigned can determine, exigent circumstances have never been equated with inconvenience to the police officers.

There were only two ways the items in question could have been removed pending issuance of a search warrant. One was through the door where the police officer was standing. The second was through the window, which was in the officer's view. In these circumstances, where were the exigencies?

There is another aspect of this case that causes some concern. The Washington Appellate Courts, in this case, have not

really discussed whether or not the police officer had probable cause to search the room. The two Courts do not seem to question whether the officer had probable cause to believe the substance was marijuana. In this connection, the question might be asked, if the police officer went to a neutral, detached magistrate, and informed the magistrate that he saw what he thought were marijuana seeds and a pipe, and that he wanted to obtain a search warrant to examine them more closely and seize them if they were marijuana, would that magistrate have issued the search warrant, or would he have asked the police officer why he wanted to examine them more closely if he really thought they were marijuana? Notice, the police officer, according to his own testimony,

entered the room to examine the seeds more closely to see if they were marijuana, and for no other purpose. (RP 43, lines 23 through 30; RP 44, lines 1 through 13). It was his testimony that, if upon examination, he confirmed his suspicions that the seeds were marijuana, he would have seized them (RP 44, lines 5 through 6). It is respectfully submitted that at the time he entered the room to look at the seeds, he had some suspicions, but not probable cause, to think the seeds were marijuana. Under these circumstances, a truly detached, neutral magistrate should have denied the search warrant for lack of probable cause, since the police officer wanted entry to examine and confirm his suspicions.

Moreover, if it is determined that

Officer Daugherty was outside the room at the time he saw what he thought might be marijuana seeds, then it is also submitted that he should have announced his intention to enter, prior to making the entry. See Ker v. U.S., 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623 (1963).

In the case at bar, of course, there is no question but what the police officer was never in danger. Accordingly, one of the primary bases for holding the knock and announce rule to be inapplicable is missing.

On the other hand, the Courts in this country recognize that, irrespective of the safety of the police officer, the dignity and privacy of the individual must be protected. In this connection see People v. Ouellette, 57 Ill.App.3d 249, 373 N.E.2d 114 (1978) (even if

occupants know who the police officer is, they must be given a chance to say "no" to his entry before the police officer enters). Similarly, the Rhode Island Supreme Court found a violation of the knock and announce rule in State v. Slezak, 350 A.2d 605 (R.I. 1976) where a police officer opened a screen door, without knocking, and without announcing his identity and purpose. Immediately upon entry, he recognized the defendant and the defendant recognized him. After the officer had crossed the threshhold, he stated to the defendant, "This is Detective Sullivan. I think you know what we are here for, Steve. We're going to advise you of your constitutional rights. Why don't you have a seat in the kitchen?" Thus, the Washington Supreme Court could easily be affirmed on the

proposition that the officer violated the knock and announce rule prior to his entry.

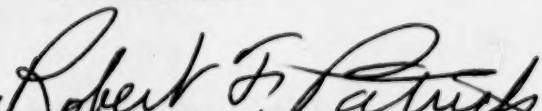
Finally, it should be reiterated that the State seems to be wanting to take both sides of the issue of whether or not Officer Daugherty was in the room. Notice, the first question presented by the State assumes that Officer Daugherty was in the protected area (the dormitory room). The second question presented assumes the officer was immediately outside the premises. Based on the State's alternate location of the police officer, the State argues the circumstances were exigent. Was Officer Daugherty in the room or wasn't he? It is respectfully submitted that unless the factual questions are clearly delineated by the party seeking review, this Court should not spend its time on the case.

CONCLUSION

The State's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

AITKEN, SCHAUBLE, PATRICK, NEILL & CHARAWELL

By 

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